STATE OF MINNESOTA
IN COURT OF APPEALS
A22-0858

State of Minnesota,
Respondent,

vs.

Tobias Osric Smith,
Appellant.

Filed May 30, 2023
Affirmed
Larson, Judge

Stearns County District Court
File No. 73-CR-20-3683

Keith Ellison, Attorney General, St. Paul, Minnesota; and

Janelle P. Kendall, Stearns County Attorney, Ole Tvedten, Assistant County Attorney, St. Cloud, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Sharon E. Jacks, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Larson, Presiding Judge; Reilly, Judge; and Reyes, Judge.

NONPRECEDENTIAL OPINION

LARSON, Judge

Appellant Tobias Osric Smith challenges his guilty plea, arguing it was inaccurate and thus invalid. Because appellant's plea colloquy provided a sufficient factual basis to establish his guilt, we affirm.

FACTS

Respondent State of Minnesota charged appellant with one count of kidnapping, Minn. Stat. § 609.25, subd. 1(3) (2018), one count of second-degree assault, Minn. Stat. § 609.222, subd. 1 (2018), and one count of threats of violence, Minn. Stat. § 609.713, subd. 1 (2018). Soon after, the state filed a notice of intent to seek an aggravated sentence, alleging that appellant was a dangerous offender based on two or more prior violent crimes and his additional criminal history.

The state and appellant entered into a plea agreement whereby appellant agreed to plead guilty to one count of threats of violence in exchange for the state dismissing the other two counts and withdrawing its motion for an aggravated sentence. The district court held a plea hearing where, after appellant waived his trial rights, he provided the following factual basis for his guilty plea:

> Q: Sir, would you agree that on May 22nd of 2020, you were driving in a vehicle with a female whose initials are ESH?
> A: Yes.
> Q: And you and her were driving in a vehicle in the city of St. Cloud, county of Stearns, state of Minnesota?
> A: Yes.
> Q: What happened when the two of you were in that vehicle?
> A: Altercation and threatening to – I told her if she don't get out of my car I'm going to push her out of the car while it was moving.
> Q: Okay. And would you agree that by making that threat if you were to actually push her out of the car you could cause substantial bodily harm?
> A: Yes.
> Q: So essentially you were threatening to commit the crime of a third-degree assault by making that threat to her?

Is that your understanding that you've discussed with your attorney?

A: Say that again. Say that again.

Q: So in making that threat, you were threatening to commit a third-degree assault, meaning that she could have substantial bodily harm if you followed through on your threat? Does that make sense?

A: Yes.

Q: Okay. And you would agree that you made that comment and it was in reckless disregard where ESH would be fearful because of what you said?

A: Yes.

The parties and the district court agreed this exchange sufficiently established a factual basis for appellant's guilty plea.

The district court subsequently held a sentencing hearing. There, appellant expressed hesitation about his guilty plea and discharged his attorney.[1] The district court asked whether appellant sought to withdraw his plea. Appellant responded he did not want to withdraw his plea and requested to proceed with sentencing. The district court proceeded to sentence appellant to the presumptive guidelines sentence of 24 months in prison.

This appeal follows.

DECISION

Appellant challenges his guilty plea, arguing it was inaccurate and thus invalid. An appellant may challenge a guilty plea's validity in the first instance on direct appeal. *Brown*

[1] Appellant claimed he felt "misguid[ed]" by his attorney and that his attorney encouraged him to "fabricate" the factual basis for his guilty plea. Appellant's attorney denied this allegation.

v. State, 449 N.W.2d 180, 182 (Minn. 1989). "To be constitutionally valid, a guilty plea must be accurate, voluntary, and intelligent." *State v. Raleigh*, 778 N.W.2d 90, 94 (Minn. 2010). A defendant bears the burden of showing inaccuracy, and we review the accuracy of a guilty plea de novo. *Id.*

Before the district court accepts a guilty plea, the accuracy standard requires the district court to "make certain that facts exist from which the defendant's guilt of the crime charged can be reasonably inferred." *Nelson v. State*, 880 N.W.2d 852, 861 (Minn. 2016) (quotation omitted). The accuracy standard "protects the defendant from pleading guilty to a charge more serious than he could have been convicted of at trial." *State v. Mikulak*, 903 N.W.2d 600, 603 (Minn. 2017). "For a guilty plea to be accurate, a factual basis must be established showing that the defendant's conduct meets all elements of the offense to which he is pleading guilty." *State v. Jones*, 921 N.W.2d 774, 779 (Minn. App. 2018), *rev. denied* (Minn. Feb. 27, 2019); *see also Nelson*, 880 N.W.2d at 859 ("The factual-basis requirement is satisfied if the record contains a showing that there is credible evidence available which would support a jury verdict that defendant is guilty of at least as great a crime as that to which he pled guilty." (quotation omitted)).

"Establishing a proper factual basis is typically accomplished by asking the defendant to express in his own words what happened." *Rosendahl v. State*, 955 N.W.2d 294, 297 (Minn. App. 2021) (quotation omitted). "[C]onsideration of evidence not expressly acknowledged and admitted by the defendant during the colloquy is not proper

for a reviewing court to consider in a 'typical' plea."[2] *Id.* at 301-02. Thus, "in determining the accuracy of a guilty plea, [we] do[] not consider allegations in the complaint unless the truthfulness and accuracy of the allegations have been expressly admitted to by the defendant." *Id.* at 302. While the use of leading questions to establish a factual basis is disfavored, a guilty plea is accurate so long as the defendant admitted each essential element of the offense. *See, e.g.*, *Raleigh*, 778 N.W.2d at 94-96 (concluding that defendant's guilty plea was accurate and explaining that "the factual basis for [the] plea [was] sufficient, despite its disfavored format"); *Nelson*, 880 N.W.2d at 860 (collecting cases and observing that "we have never held that the use of leading questions automatically invalidates a guilty plea").

Section 609.713, subdivision 1, makes it a crime for a person to "threaten[] . . . directly or indirectly, to commit any crime of violence with purpose to terrorize another . . . or in a reckless disregard of the risk of causing such terror." In *State v. Mrozinski*, the supreme court established "a person recklessly makes threats of violence," under section 609.713, subdivision 1, when:

> (1) through words or actions, [they] communicate[] an intention to injure another or their property; (2) the threat is to commit a statutorily defined crime of violence; (3) in context, those words or conduct create a *reasonable apprehension* that [they] will follow through with or act on the threat; and

[2] *Rosendahl* uses the phrase "typical plea" to mean a plea where the defendant admits their guilt, unlike an *Alford* or *Norgaard* plea. 955 N.W.2d at 301; *see also North Carolina v. Alford*, 400 U.S. 25, 37 (1970) (allowing a defendant to plead guilty, without admitting guilt, if they agree the state could present sufficient evidence to convict defendant before a jury); *State ex rel. Norgaard v. Tahash*, 110 N.W.2d 867, 871 (Minn. 1961) (allowing a defendant to plead guilty, without admitting guilt, if they claim they cannot remember the offense but acknowledge there is sufficient evidence to convict them).

> (4) [they] make[] the violent threat in *conscious disregard* of a *substantial and unjustifiable risk* that [their] words or conduct will cause extreme fear.

971 N.W.2d 233, 240 (Minn. 2022) (emphasis added).[3] "[T]he question of whether a given statement is a threat turns on whether the communication *in its context* would have *a reasonable tendency* to create apprehension that its originator *will act according to its tenor*." *State v. Schweppe*, 237 N.W.2d 609, 613 (Minn. 1975) (emphasis added) (quotation omitted). "Because threats are context specific, a person who might lack a specific intent to threaten or terrorize may nevertheless utter an objectively threatening statement recklessly, committing [the offense of threats of violence]." *State v. Bjergum*, 771 N.W.2d 53, 57 (Minn. App. 2009) (noting that "[r]ecklessness requires deliberate action in disregard of a known, substantial risk"), *rev. denied* (Minn. Nov. 17, 2009).

Appellant contends his plea colloquy lacked a sufficient factual basis to support two elements necessary for a threats-of-violence conviction. Namely, appellant claims the plea record does not show that appellant: (1) created a reasonable apprehension that he would follow through with his threat against ESH and (2) disregarded the substantial and unjustifiable risk of the threat causing ESH extreme fear. We are not persuaded.

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[3] Despite the supreme court deciding *Mrozinski* between appellant's plea hearing and sentencing hearing, the *Mrozinski* ruling applies because appellant's case was not "final" when the supreme court decided *Mrozinski*. *See Campos v. State*, 816 N.W.2d 480, 488 (Minn. 2012) (recognizing finality of conviction as threshold issue for retroactivity analysis); *O'Meara v. State*, 679 N.W.2d 334, 339 (Minn. 2004) (noting a case is final when "the availability of appeal [has been] exhausted, the time for a petition for certiorari has elapsed or a petition for certiorari [with the Supreme Court] has been filed and finally denied" (quotation omitted)), *overruled on other grounds by Danforth v. Minnesota*, 552 U.S. 264 (2008).

First, the plea colloquy established the reasonable-apprehension element. In appellant's own words, he admitted that he and ESH were "driving" and the two of them had an "[a]ltercation," in which appellant "threaten[ed]" that "if [ESH did not] get out of [his] car [appellant would] push her out of the car while it was moving." Appellant also answered affirmatively to a series of leading questions, admitting that if he pushed ESH out of the car, then he "could [have] cause[d] substantial bodily harm" and he "essentially . . . threaten[ed] to commit the crime of a third-degree assault." In these statements, appellant admitted to a tense situation in a confined space where appellant directed a threat to cause substantial bodily harm to another occupant of a moving vehicle. Although the plea colloquy does not contain any statement describing ESH's response to the threats, "in [their] context . . . [the threats] would have a reasonable tendency to create apprehension that [appellant would] act according to [their] tenor." *Schweppe*, 237 N.W.2d at 613-14 (quotation omitted) (noting the actual effect of a threat on the victim is not an essential element of the offense).

Second, the plea colloquy established the risk-of-extreme-fear element. Again, put in context, appellant admitted to a tense situation in a confined space where he acted in "reckless disregard" for whether "ESH would be fearful." "Whether the person making the communication to commit a violent act specifically intends to threaten the victim, *a violent statement can still elicit fear and cause harm*; it can still cause a person to feel intimidated." *Mrozinski*, 971 N.W.2d at 244 (emphasis added). For a threats-of-violence conviction, "[i]t need not be proven that [the alleged victim] actually experienced extreme fear." 10 *Minnesota Practice*, CRIMJIG 13.107 (2022); *see also Schweppe*, 237 N.W.2d

at 614 (noting the state need not prove that victim experienced extreme fear). Here, it can be reasonably inferred from the context of appellant's "altercation" with ESH combined with his threatening statement that appellant acted "in conscious disregard of a substantial and unjustifiable risk that [his] words or conduct [would] cause extreme fear." *Mrozinski*, 971 N.W.2d at 240; *see also Nelson*, 880 N.W.2d at 861 (noting the accuracy standard for a plea requires a district court to "make certain that facts exist from which the defendant's guilt of the crime charged can be *reasonably inferred*" (quotation omitted) (emphasis added)).

For these reasons, the plea record contains a sufficient factual basis for appellant's guilty plea to threats of violence. *See Mrozinski*, 971 N.W.2d at 240; *Rosendahl*, 955 N.W.2d at 298. Thus, appellant entered an accurate and valid guilty plea. *See Jones*, 921 N.W.2d at 779.

Affirmed.